Victor's Café 52, Inc. ***and*** **Hotel and Restaurant Employees Local 100, AFL–CIO** ***and*** **Leonardo B. Luberta.** Case 2–CA–25886

November 22, 2002

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On November 15, 1999, administrative law judge Howard Edelman issued the attached supplemental decision.* The General Counsel and the Respondent filed exceptions and supporting briefs, and the Respondent filed a memorandum in opposition to the General Counsel's exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions for the reasons set forth below, and to adopt the recommended Order.

The judge's decision and the parties' exceptions present significant issues arising out of discriminatee Alexis Raimundo Baute's admission at the compliance hearing that he made it known to potential witnesses that he would pay $1000 for testimony corroborating his assertions that when the Respondent discharged him, he was working three shifts per week as a busboy and seven shifts per week as an expediter.[2] These issues fall into two areas: first, whether the judge erred in finding that the General Counsel's gross backpay specification was inaccurate insofar as it calculated Baute's backpay based on shifts worked as a busboy; and second, whether the judge erred in including in his supplemental decision sharp criticisms of counsel for the General Counsel and her trial strategy, and if so, whether his decision should be withdrawn and the case remanded for decision to another judge.

After careful consideration, we agree with the judge, but for different reasons, that Baute's gross backpay should not reflect work as a busboy. Further, we find it unnecessary to remand the case to another judge, but we disavow the judge's criticisms of counsel for the General Counsel.

A. Factual Background

Baute was employed at the Respondent's restaurant for about 4 months when the Respondent discharged him on July 15, 1992, in violation of Section 8(a)(3) and (1) of the Act.[3] According to the findings in the underlying unfair labor practice proceeding, Baute began work for the Respondent as a dishwasher, and about 2 months later was promoted to expediter. Baute was unavailable to testify in the underlying proceeding,[4] and the judge made no findings of fact with respect to whether he had worked as a busboy. However, Baute gave his occupation as busboy on his union authorization card, signed on July 10, 1992, and on his affidavit provided, in connection with the underlying proceeding, on August 13, 1992. The judge in the underlying proceeding also found that the Respondent had kept no records of Baute's rate of pay or job classification and made all payments to him "off the books."[5]

The General Counsel calculated Baute's gross backpay on the basis of his representations to the compliance officer that he was working seven shifts per week as an expediter and three shifts per week as a busboy, at a higher rate of pay and a share of the tips. The General Counsel also relied on Baute's affidavit and union authorization card. Because the Respondent maintained no records with respect to Baute's employment, the General Counsel's ability to marshal other documentation in support of Baute's claims was limited. In its answer to the backpay specification, as amended at the compliance hearing, the Respondent admitted that Baute had worked as an expediter at the time of his discharge, but denied that he had been paid at the busboy rate for any shifts.

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* The inadvertent errors in the judge's decision have been corrected. Consistent with Board practice, we have deleted the judge's notice to employees.

[1] The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] An expediter relays customers' orders from waiters to kitchen personnel. An expediter is paid less than a busboy per shift, and, unlike a busboy, does not share in tips.

[3] *Victor's Café 52, Inc.*, 321 NLRB 504 ((1996).

[4] Id. at 508 fn. 5.

[5] During Baute's employment with the Respondent, he was not in possession of the documentation required to work legally in the United States. See id. at 508, 514. According to the undisputed testimony of the Respondent's manager, Clara Chaumont, about 2 or 3 weeks after his discharge, Baute informed her that he had straightened out his immigration papers and wished to return to work. Id. at 509. In the underlying proceeding, the Respondent argued that Baute was an undocumented alien and was "thus not entitled to reinstatement and backpay." 321 NLRB 504 fn. 3. The Board left the determination of reinstatement and backpay to compliance, citing *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408 (1995). At the compliance hearing, the Respondent informed the judge that it had withdrawn its defense to the compliance specification based on Baute's ineligibility to work. *A.P.R.A.* was subsequently enforced by the U.S. Court of Appeals for the Second Circuit, *A.P.R.A. Fuel Oil Buyers Group v. NLRB*, 159 F.3d 1345 (1998), and then reversed in *Hoffman Plastic Compounds, v. NLRB*, 535 U.S. 137 (2002). Based on Chaumont's testimony that Baute had corrected his undocumented status, and the Respondent's withdrawal of its defense in the compliance hearing, we find that the issue of his right to backpay is not before us.

At the compliance hearing, Baute and two former coworkers, Wilbur Burdon and Humberto Hernandez, testified that Baute had trained as a busboy and worked as one (as well as an expediter) at the time of his discharge. In rebuttal, the Respondent proffered the testimony of its former maitre d,' Ray O'Campo, and a waiter, Leandro Espinal, that, although Baute had trained as a busboy for a little over a week, he was never compensated as one and was working solely as an expediter when he was discharged.

With respect to the testimony of Bordon and Hernandez that he had worked as a busboy, Baute testified that when he learned that the Respondent had denied that he was a busboy, he sought proof that he had done so. He had no documentation other than his union authorization card. The compliance officer told him that he would need witnesses to corroborate his assertions. Baute telephoned O'Campo and Pedro Martinez, a former coworker still employed by the Respondent. Baute testified that he called O'Campo because he believed that O'Campo would remember that he had been a busboy. Baute offered O'Campo $1000 to testify that he worked as a busboy and an expediter when he was discharged, and requested that O'Campo ask other employees who remembered Baute to get in touch with him about testifying on his behalf.

Baute also contacted Pedro Martinez, a current employee of the Respondent. Martinez, according to Baute, remembered that he had worked as a busboy but was afraid to testify. As with O'Campo, Baute asked Martinez if he knew of anyone who would remember Baute and could testify that he had worked as a busboy. Baute told Martinez that he would pay such persons for "whatever the expenses they would need and for the inconvenience of testifying," but testified that he did not mention a figure to Martinez.

Wilbur Bordon called Baute after having learned from Martinez of Baute's situation. Baute testified that he asked if Bordon remembered that he had worked as a busboy. Bordon answered that he did and was willing to testify to that effect if Baute would pay him for the days he missed work. Baute testified that he did not mention a specific amount to Bordon, and planned to pay Bordon for time lost from work in appearing at the hearing and providing an affidavit.

Leandro Espinal, another current employee, also learned from Martinez of Baute's situation and contacted Baute. Baute offered Espinal $1000 to testify on his behalf and requested that Espinal give his telephone number to anyone who remembered him from his employment at the restaurant.

Baute testified that he never offered money to induce, or expected anyone to provide, false testimony on his behalf. He admitted that potential expenditures for testifying at the hearing would not reach $1000, but stated that he offered this amount because he did not believe anyone would come forward under any other circumstances. He also testified that he did not believe that he had done anything wrong in making the offer, as he was seeking truthful testimony, not false witness.

Based in large part on Baute's offer of money in exchange for testimony, the judge discredited the General Counsel's witnesses, credited O'Campo and Espinal, and found that Baute had never worked for Respondent as a busboy. He found that, to the extent it projected earnings based on work as a busboy, the backpay specification did not accurately reflect Baute's gross weekly wages. Thus, the judge revised the specification to reflect gross backpay based only on shifts worked as an expediter.

In exceptions, the General Counsel contends that Baute worked both as an expediter and as a busboy; that notwithstanding the offer of compensation, Baute, Bordon, and Hernandez were credible witnesses; that Baute's offer should not form the basis for finding that Baute was not entitled to backpay; and that Baute's affidavit and union authorization card provide independent reliable support for the backpay specification. As noted above, the General Counsel also excepts to the judge's use of injudicious language in characterizing Baute's integrity and her own conduct of the case, and urges, in the alternative, that this language be stricken or that the supplemental decision be withdrawn and the case remanded to another judge.

The Respondent argues that because Baute suborned perjury on the issue of his busboy status, he not entitled to any backpay. The Respondent argues further that if Baute is entitled to backpay, the judge miscalculated the gross backpay for the expediter position.

B. Analysis

1. Computation of Baute's gross backpay

In adopting the judge's revised gross backpay calculations, we find it unnecessary to reach the issue of whether the General Counsel's witnesses or the Respondent's witnesses testified truthfully with respect to Baute's employment as a busboy, and, as discussed below, we disavow the judge's analysis of the credibility of the witnesses in this point and the character of Baute and counsel for the General Counsel. Instead, we find that, by offering payment for testimony far in excess of what might be justified as reasonable compensation for a witness's time, expenses, or other lost economic opportunities associated with testifying, Baute "interfere[d] with the Board's processes by attempting to influence and manipulate a witness in a Board proceeding" within the meaning of the Board's holding in *Lear-Siegler Management Service Corp.*, 306

NLRB 393, 394 (1992), and thus, we find it appropriate to deny Baute the amount of gross backpay attributable to work as a busboy.

The issue of payments to witnesses—which also raises the troubling possibility of payment *for* testimony—appears to be one of first impression in Board law. Section 102.32 of the Board's Rules and Regulations provides for the payment of witness fees and mileage, by the party at whose instance the witness appears. But by its terms, this rule does not create a cap on what payments may be made to witnesses without compromising the integrity of the adjudicative process. It is a fact that "[t]o procure the testimony of witnesses it is often necessary to pay the actual expenses of a witness in attending court and a *reasonable compensation* for the time lost." Jeffrey Kinsler and Gary S. Colton Jr., *Compensating Fact Witnesses*, 184 F.R.D. 425, 431 (1999) (emphasis added). What reasonable compensation may be will necessarily vary with the circumstances. Here, that question is not difficult: the payment offered in this case not only exceeded the payments that would have been provided pursuant to the Board's rule, but was also far in excess of any amount reasonably necessary to compensate the witnesses for the purely economic costs associated with testifying. Instead, the offer strongly suggests a corrupting effect on the Board's processes.

In *Lear-Siegler* above, the Board considered the effect on Board processes of an employee's threat against a witness to compel testimony favorable to the employee. In that case, Wood, a discriminatee, believed that another employee, Sumlin, would provide testimony favorable to him. When Wood learned that Sumlin might change his testimony, he threatened to reveal that Sumlin had violated his probation. The Board found that Wood's conduct constituted serious interference with Board processes:

> The integrity of the Board's judicial process depends on witnesses telling the truth, as they see it, without fear of reprisal *or promise of reward*. . . . It makes no difference that Wood may have believed that he was seeking to ensure true testimony as he saw it. . . . [Any] witness in a Board proceeding [ ]should be free to testify to the truth, without fear of reprisal, as they see the truth. It is then the role of the judge and the Board to determine whether the testimony is true or false."

Id. at 394 (emphasis added).[6]

The Board held further "that a discriminatee who interferes with the Board's processes by attempting to influence and manipulate a witness in a Board proceeding will forfeit his right to backpay beyond the date of the impermissible interference." Id. The Board found that such a remedy struck "a balance between the competing and equally important interests of protecting the Board's judicial processes and remedying unfair labor practices." Id. Denying backpay after the misconduct ensured prevented those who abuse the Board's process from reaping a full remedy, while granting backpay for periods untainted by misconduct ensures that unlawful conduct does not go unremedied.[7]

We find that Baute's offer of a reward for testimony is an attempt "to influence and manipulate a witness in a Board proceeding," and that *Lear-Siegler* is clearly applicable to such conduct. Thus, we find it necessary, in considering the appropriate remedy for the Respondent's unlawful discharge of Baute, to strike the same balance between safeguarding the Board's judicial processes from manipulation, and at the same time protecting the public interest by remedying unlawful conduct. As Baute's misconduct occurred during the compliance phase of the proceeding and outside the backpay period, the Board's calculus in *Lear-Siegler*—tolling backpay as of the date of the misconduct—is not apposite here.[8] We look instead to the Board's analysis in a compliance case where, as here, the Board was unable to determine with certainty the effect of a discriminatee's misconduct on the calculation of the backpay remedy. In *American Navigation Co.*, 268 NLRB 426 (1983), the Board held that discriminatees who willfully conceal interim employment from the Board will be denied backpay for all quarters in which they engaged in the concealed employment. In *American Navigation*, discriminatee Adams concealed 4 weeks' interim employment in connection with the compliance procedure. The judge was unable to determine from the record with certainty whether the concealed employment occurred during the third quarter, the fourth quarter, or both, of the year at issue.

[6] In finding that Baute's conduct precludes backpay at the busboy rate, we assume without deciding that Baute testified sincerely that he did not intend the offer of compensation to induce false testimony and that he did not intend to do anything wrong. Under the Board's analysis in *Lear-Siegler*, however, Baute's subjective intent is irrelevant. His actions—offering potential witnesses an unreasonably large payment in exchange for testifying that he had worked as a busboy, and requesting that they in turn let other potential witnesses know about the offer—cannot reasonably be found not to have interfered with the Board's judicial process.

[7] In *Lear-Siegler*, the Board also found that Wood's interference in Board processes, taken alone, did not warrant forfeiture of his right to reinstatement, but found reinstatement inappropriate based on other factors. We need not reach the issue of whether Baute's conduct would have a similar effect on reinstatement, as the compliance specification does not place reinstatement at issue.

[8] It is not clear from the record when Baute made his offer to O'Campo, and at the time the hearing was held, no payments had been made. Although we find that the offer itself was improper regardless of whether the witnesses were ever paid, we cannot assign a date certain to the beginning of Baute's conduct.

The Board held that Adams should be denied backpay for both quarters, noting that

> it is impossible to determine whether this employment occurred in the third or fourth quarter or portions of both. . . . Because we cannot determine that the concealed employment occurred in one particular quarter . . . we shall deny all backpay claimed for both quarters. While it may seem harsh to deny Adams backpay for two quarters for his concealing at most 4 weeks of employment, the uncertainty as to the appropriate quarter is directly attributable to Adams' failure to be candid with the Board.

Id. at 428.

In this case, Baute's conduct has, in effect, rendered it impossible to determine whether he worked for the Respondent as a busboy.[9] Thus, applying the analysis in *American Navigation*, we find it appropriate to deny Baute the amount of backpay that is based on his contentions that he worked as a busboy at the time of his discharge. We find that our remedy here is consistent with the balance struck by the Board in *Lear-Siegler* and *American Navigation* between the equally important policies of discouraging unfair labor practices by remedying them and protecting Board processes from manipulation by denying Baute any benefit that might have flowed from his interference with Board processes.

2. The judge's attacks on Baute and counsel for the General Counsel

In his decision, the judge was harshly critical of Baute for making the offer of money for testimony and of counsel for the General Counsel for advocating the claim that Baute's gross backpay should be calculated based on shifts worked as a busboy and an expediter, and for arguing in brief that Baute, Bordon, and Hernandez were credible witnesses. The General Counsel argues, inter alia, that this language exhibits prejudice and is grounds for withdrawal of the judge's decision and assignment of the case to another administrative law judge, or in the alternative, that the language should be redacted from the judge's decision. The Respondent argues that such remedies are unprecedented and inappropriate.

After careful examination of the record, the parties' arguments, and the judge's decision, and in light of our findings, we find it unnecessary to reassign the case.[10] The discrete issue of Baute's entitlement to backpay at the busboy rate has been decided as a matter of law, based on his admissions at the hearing, and without reliance on, and indeed with an explicit disavowal of, the judge's credibility resolutions, findings of fact, and inferences with respect to this issue. Further, our review of the judge's findings and conclusions with respect to Baute's backpay show that the judge's hostility toward Baute because of his offer did not color his consideration of other issues raised by the Respondent's pleadings. Thus, as to the other matters raised by the Respondent's answer to the backpay specification, we find that Baute received fair consideration from the judge.[11] In this respect, although the judge found that Baute had interim earnings in the third and fourth quarters of 1993 based on his original specification, he also found, inter alia, that Baute was not attempting to conceal earnings arising from a personal translation business; that this business did not interfere with his search for work; that his efforts to find work were prompt and conscientious; and, with respect to the effect on his availability for work of Baute's travel outside the country, that "Baute's continuing efforts to recollect additional information as to when he was out of the country is to his credit and should not be used against him."

We do, however, find merit in counsel for the General Counsel's assertions that the criticisms the judge directed at her and Baute in connection with his discussion of the credibility of the General Counsel and Respondent witnesses as to the busboy issue were improper.

An administrative law judge's duties and responsibilities in handling an unfair labor practice proceeding are considerable. The Board's Rules and Regulations accord a judge significant discretion in controlling the hearing, directing the creation of the record, and crafting the decision.[12] In exercising that discretion, however, a judge

[9] In so finding, we note that the judge's credibility resolutions were based largely on his anger, for which we do not fault him, at Baute's attempt to "bribe" witnesses. He found that Hernandez, who testified favorably for Baute, had been offered $1000 by Baute even though there is no evidence in the record to support such a finding. His favorable credibility resolutions with respect to O'Campo and Espinal were also colored by his reaction to Baute's offer of payment, in that he noted that they were testifying without compensation. Thus, it is impossible to consider the question of Baute's employment as a busboy separately from his offer of payment for testimony to that effect.

[10] Further, as we have disavowed the judge's criticism of counsel for the General Counsel and Baute, we deny the motion to redact parts of his supplemental decision.

Member Cowen would grant the General Counsel's motion to redact. In his view, publishing, without redaction, the judge's supplemental decision compounds the harm caused by the judge's public reprimand of the General Counsel without due notice because the Board's decision republishes and immortalizes the words of contumely.

[11] Thus, we find no merit in the Respondent's exceptions to the gross pay specification as recalculated by the judge.

[12] A judge clearly has the authority under the Rules and Regulations to deal with misconduct at a hearing. Sec. 102.77(b) of the Board's Rules and Regulations provides that "[m]isconduct by any person at any hearing before an administrative law judge, . . . shall be grounds for summary exclusion from the hearing. . . . [T]he administrative law

must always meticulously avoid viewing either party's case or witnesses with bias or prejudice. Further, "[i]t is essential not only to avoid actual partiality and prejudgment . . . in the conduct of Board proceedings, but also to avoid even the appearance of a partisan tribunal." *Indianapolis Glove Co.*, 88 NLRB 986, 987 (1950). Section 101.10(b) of the Board's Statements of Procedure requires that "[t]he functions of all administrative law judges . . . [be] conducted in an impartial manner." The Board has also stated that:

> [t]he terms "bias and "prejudice" can also be applied when a judge's conduct, for whatever reason, "precludes a fair determination" of the merits, *Dayton Power & Light Co.*, 267 NLRB 202, 203 (1983), prejudicing not only the party affected, but also the basic objective of "inquiring fully into the facts," *Hall Industries*, 293 NLRB 785 fn.1 (1989), enfd. mem. 914 F.2d 224 (3d Cir. 1990). Beyond that, "proceedings should be free from any *appearance* [emphasis in quoted material] of partiality of bias." *Engineers Beneficial Assn., District 1 (Crest Tankers)*, 274 NLRB 1481, 1482 fn. 5 (1985).

National Labor Relations Board Division of Judges, Bench Book, p. 12 (Sec. 2–510, Grounds Asserted for Disqualification).

Thus, an administrative law judge must scrupulously avoid *any* conduct that could possibly lead to an appearance of partiality.[13] This obligation may be particularly difficult where, as here, a party's actions could have compromised effectuation of the hearing's purposes of developing an accurate factual record, applying the appropriate legal standards, and rendering fair judgment.

The difficulty of this task, and the weight of the burden on the judge, however, do not lessen the importance of discharging the responsibility fully and with scrupulous attention to fairness and to the appearance of fairness.[14] While our examination of the record and disposition of the case do not require us to conclude that the administrative law judge in this case was prejudiced or gave the appearance of prejudice, we emphasize that the judge's peroration in his decision against Baute and counsel for the General Counsel could raise doubt as to the integrity of the Board's decisionmaking processes. Even in the absence of prejudice or the appearance of prejudice, intemperate language, like that employed by the judge in this case, undermines the confidence of parties, representatives, and the public in the overall fairness and equity of the Board's treatment of parties, and in the Board's ability to establish accurate factual records, draw unbiased conclusions, and, in light of applicable principles, render fair judgment.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, and orders that the Respondent, Victor's Café 52, Inc., New York, New York, its officers, assigns, agents, successors, and assigns shall make the employees named below whole by paying to them the amount set forth opposite their names, plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and accrued to the date of payment minus tax withholding required by State and Federal laws.

Raimundo Alexis Baute	$31,081.21
Humberto Hernandez	$17,990.20
Total Backpay	$49,071.41

Dated, Washington, D.C. November 22, 2002

Wilma B. Liebman,	Member
William B. Cowen,	Member
Michael J. Bartlett,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, concurring.

I agree with my colleagues, and the judge, that discriminatee Baute should be denied backpay at the busboy

judge . . . shall also have the authority in the proceeding in which the misconduct occurred to admonish or reprimand, *after due notice*, any person who engages in misconduct at a hearing." (Emphasis added.) Moreover, Sec. 105.177(d) provides that:"[m]isconduct by an attorney or other representative at any stage of any Agency proceeding, including but not limited to misconduct at a hearing, shall be grounds for discipline. Such misconduct of an aggravated character shall be grounds for suspension and/or disbarment from practice before the Agency and/or other sanctions."

Thus, had the judge believed that misconduct had occurred, he was not without recourse under the Rules and Regulations. However, Members Cowen and Bartlett believe that his supplemental decision delivered, in effect, a public reprimand to the recipient with the "due notice" required by the Rules and Regulations.

[13] The Supreme Court has held that prejudice can be based on facts adduced at trial, when the negative opinion is excessive in degree. *Liteky v. U.S.*, 510 U.S. 540, 550 (1994).

[14] We are not wholly without sympathy for the judge. He was confronted at trial with a shocking admission. However, in our view, that does not justify use of intemperate language and attacks against fundamental personal integrity.

rate.[1] My colleagues reject the judge's credibility-based rationale for this conclusion and, instead, find that the denial of backpay at the busboy rate is appropriate as a sanction in light of Baute's offer of money to witnesses, relying on *Lear-Siegler Management Service Corp.*, 306 NLRB 393 (1992), a case that the parties have not cited and one that implicates difficult issues that need not be resolved in the present circumstances. In contrast, I believe that the case is better decided on credibility grounds, as the judge did. As I will explain, I would rely on some, if not all, aspects of the judge's valid credibility findings in affirming his award of backpay to Baute at the lower expediter rate.

The sole burden on the General Counsel in backpay proceedings is to show the gross amount of backpay due the discriminatee.[2] However, in establishing that showing, the evidence must be credible. Where the testimony of a claimant proves to be unworthy of belief, the claimant may be found ineligible to recover. *Continental Insurance Co.*, 289 NLRB 579, 583 (1988). As explained below, I agree with the judge's conclusion that the General Counsel has not met his burden.

Based on Baute's offer of $1000 to witnesses who would testify that he was a busboy, the judge found that Baute's testimony on the busboy issue was tainted, as was the testimony of the General Counsel's other witnesses, Bordon and Hernandez, on that issue. However, the judge also made independent credibility determinations about the testimony of Bordon and Hernandez. Thus, in discrediting Bordon he relied not only on Bordon's acceptance of Baute's offer, but also on the passage of time and Bordon's unfamiliarity with Baute's work. Similarly, the judge found that Hernandez, while generally credible, displayed a genuine lack of memory regarding his own employment history between 1994 and 1995. For this reason, the judge found that Hernandez' memory was even less reliable regarding Baute's employment status in 1992.

Independent of any consideration of possibly tainted testimony, I agree for the other reasons stated by the judge that the testimony of Bordon and Hernandez was not credible. Thus, based on my review of the record, I would find that Bordon's testimony presented a sketchy recollection, at best, of Baute's responsibilities at the restaurant. Bordon demonstrated, through his testimony, that he had little idea of who Baute was or what his responsibilities were at the restaurant. I also agree with the judge that Hernandez' memory was faulty. Accordingly, I would adopt the judge's findings discrediting the testimony of Bordon and Hernandez that Baute worked as a busboy.

I then come to the question of Baute's admitted offer to compensate witnesses and whether that offer tainted his testimony, or that of those witnesses who received the offer. No Board case seems to have treated this issue; however, the prevailing view in the courts and among state bar authorities appears to be that a witness may be offered reasonable compensation for expenses and loss of time in connection with preparing for, attending, and testifying at trial. See Jeffrey S. Kinsler & Gary S. Colton Jr., *Compensating Fact Witnesses*, 184 F.R.D. 425 (1999). Compensation may not be used to influence testimony or be conditional on the content of the testimony, and payments to fact witnesses must be reasonable. Id. Where a questionable payment is made, it should be treated as affecting the credibility (as opposed to the competence) of a witness. See, e.g., *Goldstein v. Exxon Research & Engineering Co.*, 1997 WL 580599, *607 (D.N.J. 1997); *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 545 F.Supp. 1314, 1369–1370 (S.D.N.Y. 1982). I think that this analysis is appropriately applied here. Insofar as my colleagues hold that fact witnesses properly may be paid reasonable compensation, I am in full agreement with the majority opinion.

Here, the judge found that the $1000 offer made by Baute was far in excess of reasonable compensation for the time and inconvenience associated with preparing for and testifying at trial. He thus found that Baute's credibility on the busboy issue was tainted by his offer to compensate witnesses who were willing to testify that he worked as a busboy. While an offer of reimbursement should not necessarily disqualify an individual as a credible witness, I agree that no showing has been made here that the $1000 offer bore a reasonable relationship to the cost of the employee witness' time and expense. I therefore believe that the offer is appropriately considered as a factor in evaluating Baute's credibility. I see no basis here for rejecting the judge's decision to discredit Baute on this ground.[3]

With the testimony of Baute, Bordon, and Hernandez discredited, there remains for consideration the testimony

[1] In addition, I join my colleagues in condemning the judge's use of intemperate language in his references to Baute and the General Counsel, although I agree with Member Bartlett in denying the General Counsel's motion to redact.

[2] *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980), enfd. sub nom. *Angle v. NLRB*, 683 F.2d 1296 (10th Cir. 1982).

[3] Where an offer to compensate a witness is not reasonable, it casts doubt on the credibility of those who make the offer, as well as those who accept it. The judge relied on the offer of payment to discredit not only Baute, but also Bordon and Hernandez. Because I would adopt the judge's discrediting of their testimony on independent grounds, I need not also rely on a possible taint resulting from Baute's offer of money as the basis for discrediting Bordon and Hernandez.

of the Respondent's witnesses. As stated, the Respondent presented two witnesses on the issue of Baute's busboy status, former maitre d' Ray O'Campo and employee Leandro Espinal, both of whom had been contacted by Baute and offered compensation for their supportive testimony. O'Campo declined Baute's offer and testified that he had no recollection that Baute was a busboy at the time of his discharge. He recalled that Baute may have been a busboy "trainee" for about a week, but did not receive any busboy pay. Like O'Campo, Espinal testified that Baute had briefly trained as a busboy. The judge credited both O'Campo and Espinal, noting particularly that both had received only transportation expenses for their testimony.

For the purposes of this analysis, I find it unnecessary to rely on the credited testimony of O'Campo and Espinal. As explained above, while Baute's offer of compensation was a valid basis for discrediting the tainted testimony, that offer clearly provoked a harsh and intemperate reaction from the judge. Because it is possible that the depth of the judge's outrage may have influenced his decision to credit O'Campo and Espinal on the busboy issue, I do not rely on that negative credited testimony of O'Campo or Espinal in adopting the judge's conclusions. Rather, I rely on the lack of affirmative credited evidence that Baute *was* a busboy.

In sum, in light of my adoption of the judge's credibility findings with respect to Baute, Bordon, and Hernandez, I would find that the General Counsel has failed to meet his burden to provide any material or credible evidence to support a finding that Baute was entitled to additional backpay for his work as a busboy.[4] For that reason, I would find that the judge correctly denied Baute backpay at the busboy rate.

As I have said, my colleagues and I agree on the correct result here. I differ with them only insofar as they reach that result by denying relief to Baute as a sanction based solely on his offer of payment to witnesses, as opposed to deciding the case on its merits, as the judge did and as the record permits. I certainly agree that the Board must be vigilant in protecting the integrity of its processes. *Lear-Siegler*, on which my colleagues principally rely, requires "strik[ing] a balance between the competing and equally important interests of protecting the Board's judicial processes and remedying unfair labor practices." 306 NLRB at 394. That balancing is a complex, context-specific exercise, which presents difficult issues here.[5] There is no need to undertake that task because, on the merits, Baute was not entitled to the backpay remedy sought on his behalf.

Dated, Washington, D.C. November 22, 2002

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER COWEN, concurring.

Like Member Bartlett, I find that under *Lear-Siegler Management Service Corp.*, 306 NLRB 393 (1992), Baute's interference in Board processes precludes backpay at the busboy rate. Unlike my colleagues, however, I also find for the reasons stated below that the judge's critical remarks should be excised from the record and that the judge exceeded his authority under the Board's Rules and Regulations, which do not contemplate a judge's use of an administrative decision to deliver a stinging criticism of any attorney or party representative.

Section 102.35 of the Board's Rules and Regulations, as amended, sets out the duties and powers of administrative law judges. In relevant part, the rule provides that:

> [t]he administrative law judge shall have authority . . . subject to the Rules and Regulations of the Board and within its powers: [. . .]
>
> (1) To administer oaths and affirmations;
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> (2) To grant applications for subpoenas;
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> (3) To rule upon petitions to revoke subpoenas;
>
> (4) To rule upon offers of proof and receive relevant evidence;
>
> (5) To take or cause depositions to be taken whenever the ends of justice would be served thereby;
>
> (6) To regulate the course of the hearing and, if appropriate or necessary, to exclude persons or counsel from the hearing for contemptuous conduct and to strike all related testimony of witnesses refusing to answer any proper question . . .

[4] The only remaining evidence on the record in support of the General Counsel's claim is Baute's union authorization card, on which he listed his job classification as busboy, and his affidavit in the unfair labor practice proceeding. The judge noted that Baute was likely to have misrepresented his position in his affidavit in an effort to "beef up" his credentials and add to his backpay entitlement. I do not agree that Baute's affidavit and union authorization cards necessarily reflect misrepresentations on his part. Rather I view them as some evidence that Baute honestly may have believed he was a busboy, particularly in light of the evidence, corroborated by Respondent's witnesses, that he underwent some training as such. However, I find this evidence insufficient to meet the General Counsel's burden because it does not demonstrate that Baute actually held that position.

[5] It is arguably possible to conclude that, despite the excessiveness of his offer, Baute did not intend the offer—which he candidly admitted to the judge—to elicit false testimony or to manipulate witnesses. Compare *American Navigation Co.*, 268 NLRB 426 (1983) (discriminatee's willful deception of Board by concealing interim earnings). In turn, a payment to a fact witness is not always improper, while the opposite is true of a threat, the conduct at issue in *Lear-Siegler*.

> (8) To dispose of procedural requests, motions, or similar matters . . .
>
> (13) To take *any other action necessary* under the foregoing and *authorized by the published Rules and Regulations of the Board*.

[Emphasis added].

Section 102.45(a) provides for the content of the administrative law judge's decision:

> [a]fter a hearing for the purpose of taking evidence upon a complaint, the administrative law judge shall prepare a decision. Such decision shall contain *findings of fact, conclusions,* and *the reasons or basis therefor, upon all material issues of fact, law, or discretion presented on the record*, and shall contain *recommendations as to what disposition of the case should be made,* which may include, if it be found that the respondent has engaged in or is engaging in the alleged unfair labor practices, a recommendation for such affirmative action by the respondent as will effectuate the policies of the Act.

[Emphasis added].

I cite the above rules in some detail to indicate both the breadth of an administrative law judge's authority with respect to an unfair labor practice proceeding and the limitations on that authority. As my colleagues have observed, it is clear from the Rules and Regulations that a judge's duties and responsibilities in handling an unfair labor practice case are considerable, and that the Board's Rules and Regulations accord a judge significant discretion in controlling the hearing, directing the creation of the record, and crafting the decision. That discretion, however, must always be exercised within the structure of the Rules and Regulations.

In evaluating the General Counsel's exceptions, then, we look to whether the Board's Rules and Regulations, as applicable to the duties and authority of a judge in conducting a hearing and issuing a decision, authorize, or permit the inclusion in the judge's decisions of remarks at issue here. I find that they do not.

With respect to the authority set out in Rule 102.35, the judge's remarks did not reflect a finding of fact or an assessment of relevant evidence, were not the result of a ruling on a motion, and did not respond to contemptuous misconduct during the course of the hearing.

Further, measuring the judge's language against Section 102.45(a)'s exhaustive and exclusive enumeration of the elements of an administrative decision shows that this Section also does not authorize or permit the judge's remarks as they cannot reasonably be read as setting forth findings of fact and conclusions "on material issues of fact, law, or discretion presented in the record," or contain recommendations as to the disposition of the case. Thus, by including the remarks in his decision, the judge exceeded his authority and discretion under Section 102.35 and 102.45.

Simply put, the Rules and Regulations do not contemplate a judge's use of an administrative decision to deliver a stinging criticism of any attorney or party representative. Thus, the judge's remarks do not represent an appropriate exercise of his authority under the Rules and Regulations and should not be included in the published decision.

Dated, Washington, D.C. November 22, 2002

William B. Cowen, Member

NATIONAL LABOR RELATIONS BOARD

Margit Reiner, Esq., for the General Counsel.
Stanley Israel, Esq., for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. On June 18, 1996, the National Labor Relations Board issued its Decision in the underlying unfair labor practice case finding that Victor's Café 52, (Respondent) had violated Section 8(a)(1) and (3) of the Act by discharging Raimundo Alexis Baute, Victor Ramirez Ruiz, and Humberto Hernandez, and directing Respondent to make them whole for any loss of pay they may have suffered as a result of Respondent's discrimination against them. 321 NLRB 504 (1996).

On September 17, 1998, and March 22, 1999, Region 2 issued a compliance specification and notice of hearing and an amended compliance specification and notice of hearing respectively. On October 19, 1998, and April 9, 1999, Respondent issued its answer to the compliance specification and answer to the amended compliance specification, respectively. A trial in this matter was held on June 22 and 23, 1999. At the June 22 trial, amended appendices to the compliance specification (second revised for Baute and third revised for Hernandez) were admitted into evidence.

It is well settled Board law that the finding of an unfair labor practice is presumptive proof that some backpay is owed, *La Favorita, Inc.*, 313 NLRB 902 (1994), enfd. 48 F.3d 1232 (10th Cir. 1995), and that the sole burden on the General Counsel in a backpay preceeding is to show the gross amount of backpay due the discriminatee, i.e., the amount the employee would have received had the Respondent never engaged in conduct in violation of the Act. *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980), enfd. sub nom. *Angle v. NLRB*, 683 F.2d 1296 (10th Cir. 1982). Any formula which approximates what a discriminatee would have earned absent Respondent's discrimination is acceptable if not unreasonable or arbitrary under the circumstances. *Laborers Local 158 (Worthy Bros.)*, 301

NLRB 35 (1991), enfd. sub nom. *NLRB v. Heavy & Highway Construction Workers Local 158*, 952 F.2d 1393 (3d Cir. 1991).

It should be noted at the outset that Respondent paid its employees in cash and kept no records of the earnings or of the classifications of the above named discriminatees.

General Counsel's calculation of the backpay period set forth in its compliance specification is not denied by Respondent. Similarly, there are no issues concerning the computation of gross backpay for Hernandez. Respondent stipulated to the projected weekly salary and projected weekly tips as shown in the third revised appendix for Hernandez. General Counsel's allowance of $480 in interim expenses for Hernandez during the second quarter of 1993 did not result in any financial gain to him, as he received no credit for net backpay during that quarter. Finally, with regard to gross backpay for Hernandez, General Counsel did not credit him with entitlement to backpay during the period he left the country, and Respondent did not allege that that period was incorrectly calculated.

With regard to the computation of gross backpay for Baute, Esther Morales, the compliance officer who computed his backpay, testified that she calculated Baute's weekly salary of $385 as set forth in the second revised appendix based on the affidavit he gave in the investigation of the underlying unfair labor practice case which shows that he worked as an expediter 6 days per week at $50 per week at $50 per shift, and one lunch shift at $25 for a total of $325/week. Baute told Morales that he also worked as a busboy 3 days per week at $20 per shift, $60/week, plus tips estimated at $60/week. His projected weekly salary was $445/week.

With regard to the interim expenses with which he was credited, Baute testified that he received one free per shift, that is, seven dinners and three lunches, when working for Respondent. Until he began working for La Maganette in early 1996, he did not receive any meals from his interim employees and paid approximately $5 for his lunches and $10 for his dinners. When he began working at La Maganette, they provided him with meals at a charge of $2.25/meal. Morales testified that, based on the above, she calculated Baute's interim expenses to cover the meals he had received gratis when working for Respondent. Thus, he was credited with expenses of $10/dinner for seven dinners and $5/lunch for three lunches for a total of $85/week until he began working at La Maganette. Thereafter, he was credited with expenses of $2.25/meal for 10 meals or $22.50/week.

Finally, with regard to gross backpay for Baute, General Counsel did not credit him with entitlement to backpay during the periods he left the country.

I conclude these backpay calculations as to gross backpay were accurate if one assumes the interviews with Morales, Baute, and Hernandez resulted in accurate factual figures. I conclude the gross backpay figures as to Hernandez are accurate. For reasons set forth in detail below, I conclude Baute's figures must be substantially reduced.

In the revised backpay specifications Ruiz' name is not included. It appears there was a settlement as to that aspect of the compliance specification.

Respondent admits that the gross backpay figure of $17,990.20, for Hernandez is accurate but contends a willful loss of earnings by Hernandez in July and August 1994, March of 1995, and December of 1995.

Once the General Counsel establishes the amount of gross backpay due, the burden shifts to Respondent to show that the backpay liability should be mitigated or eliminated. *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963); *Hagar Management Corp.*, 323 NLRB 1005 (1997). In this regard, the Respondent has the burden of establishing the amount of any interim earnings that are to be deducted from the backpay amount due, and has the burden of establishing any claim of willful loss of earnings. *NLRB v. Mooney Aircraft*, 366 F.2d 809, 812–813 (5th Cir. 1966). An employer may thus mitigate its liability by showing that a discriminatee "willfully incurred" a loss by a "clearly unjustifiable refusal to take desirable new employment." *Phelps-Dodge Corp. v. NLRB*, 313 U.S. 177, 198–200 (1941). It is also well settled that any uncertainties are to be resolved against the Respondent, as the wrongdoer, and in favor of the employee discriminatee. See *Airport Park Hotel*, 306 NLRB 857, 858 (1992), and cases cited therein. Further, with respect to a discriminatee's search for interim employment, Respondent must establish affirmatively that the discriminatee failed to make a reasonably diligent search for equivalent interim employment. In evaluating the search for work, the Board has stated that a discriminatee's efforts need not comport with the highest standards diligence but merely needs to be a good faith effort. *Lundy Packing Co.*, 286 NLRB 141 (1987).

The Board in *Basin Frozen Foods*, 320 NLRB 1072, 1074 (1996), affirmed the administrative law judge who concluded that an employee diligent search for work was established by the fact that he was able to find various jobs during the backpay period room the various source he used.

The Board in *Alaska Pulp Corp.*, 326 NLRB 522 (1998), addressed an employer's affirmative defense to paying backpay where the individual admitted only that he sought interim work "off and on." The employer claimed that this statement proves the individual failed to make reasonable efforts to find interim employment. The Board disagreed; although the record was "devoid of such essential details as what type of employment [the individual] applied for, how many contacts or applications he made, and when, "the employer failed to meet its burden of showing that the individual did not engage in a reasonable search. The Board declined to infer that the individual's efforts were not adequate "at the most, the evidence creat[ed] only an element of doubt which must be resolved in [the individual's] favor, and not the [employer's]."

In *NLRB v. Arduni Mfg. Corp.*, 394 F.2d 420 (1st Cir. 1968), the employer was able to show that an individual: (1) only went to the Employment Security Office to see about unemployment benefits; (2) did not believe in reading "help wanted" ads; (3) could not show that he sought jobs where his carpentry skills could be utilized; and (4) could not explain gaps in his chronology of job-hunting events. 394 F.2d at 422. The court held that the NLRB could find that a reasonable search was conducted here despite these indications that the individual did not do all he could to mitigate his loss of pay. The individual was able to make over 70 percent of his prior earnings, he collected and provided W-2 forms, and was otherwise cooperative. The

court agreed with the Board that the individual satisfied his standard in this case.

The Board in *Airport Park Hotel*, 306 NLRB 857 (1992), held that the "fact that [an individual] could not recall the names of all the establishments she contacted during [the interim employment] period" does not invalidate the conclusion that the individual made reasonable exertions to find employment. 306 NLRB at 861. See also *The Blue Note*, 296 NLRB 997, 999 (1989) (that an individual could not remember the names of all the places she called or visited does not invalidate a backpay claim since it is not unusual given the length of time that has passed (2 years)).

It is clear that the Board places a very heavy burden on the employer to show that an individual did not engage in a reasonable job search. Where the record reflects that some kind of job search occurred, this seems to be enough for the Board, even if specific names and places cannot be recalled. *Castaways Management*, 308 NLRB 261, 262 (1992).

With respect to Hernandez, Respondent alleges two defenses to the calculation of Hernandez' interim earnings in the years 1994 and 1995. (1) That Hernandez had greater interim earnings during 1994 and 1995 than those shown on the backpay specification and, (2) that he incurred a willful loss of earnings during July and August 1994, and March and December 1995.

Hernandez testified that, starting in July 1993, he worked at Pasta al Forno as a waiter. He remained there nearly 1 year, until around mid-1994. He gave uncontradicted testimony that during that time, he left the country because of his mother's illness he was out of work for approximately 3 weeks. Hernandez' earnings at Pasta al Forno during 1994, the first year Respondent contested his interim earnings, were $11,438, as reflected in the W-2 furnished him. Thus, during the first and second quarters of 1994, General Counsel charged Hernandez with interim earnings of $5719/quarter ($11,438 divided by the 6 months Hernandez worked at Pasta al Forno in 1994 multiplied by the 3 months in each quarter).

After leaving Pasta al Forno, Hernandez obtained a job in September 1994 at L'Incontro where he stayed until December 1994 at which time he was laid off because business was slow. Hernandez' earnings at L'Incontro during 1994 were $2,663.98, as reflected in the W-2 provided him. Based on this, Hernandez was charged with interim earnings of $665.99/month ($2,663.98 divided by the 4 months Hernandez worked at L'Incontro) for the period when he worked at L'Incontro, i.e., $665.99 for September and $1,997.97 ($665.99 x 3) for the 3 months of the fourth quarter of 1994.

After his lay off from L'Incontro in December 1994, Hernandez began working at Federico's in January 1995. He was laid off a short time later because business was very slow and he had been the last person hired. In February 1995, Hernandez then got a job at Moreno's. He remained there about 1 month and then was let go because business was slow. The W-2 forms given him by Federico's and Moreno's accurately reflect Hernandez' earnings at each restaurant. Hernandez was charged with interim earnings of $1,425.32 during the first quarter of 1995 ($384 from Federico's $1,041.32 from Moreno's).

Hernandez next obtained employment on April 1995 at the 133 Restaurant. He only worked there 1 week because the restaurant was trying out three people and decided to hire someone they knew. In May 1995, Hernandez began working at 11 Tinelo. Hernandez stayed at 11 Tinelo until November 1995. At that time, he was let go because, although the owner felt he was a good worker, the restaurant was a five-star restaurant and he dropped the tray on two occasions. The W-2 forms from 133 Restaurant and 11 Tinelo accurately reflect Hernandez' earnings at each of those restaurants. Thus, for the second quarter of 1995, Hernandez is charged with interim earnings of $2,469.48, comprising $435.20 from 133 Restaurant and $2,034.28 from 11 Tinelo ($7,120 divided by the 7 months Hernandez worked at 11 Tinelo [$1,017.14] multiplied by the 2 months of work at 11 Tinelo during the second quarter of 1995). For the third quarter of 1995, interim earnings of $3,051.42 reflect Hernandez' monthly earnings of $1,017.17 multiplied by the 3 months of that quarter. For the fourth quarter of 1995, interim earnings of $2,034.28 reflect Hernandez' monthly earnings of $1017 from 11 Tinelo multiplied by the 2 months of the fourth quarter that he worked for 11 Tinelo.

In January 1996, Hernandez began working at Elaine's, earning more than he earned when working for Respondent.

Hernandez' testimony regarding his interim earnings was straightforward and credible. His uncertainty as to exactly when he worked for each interim employer are simply a genuine lack of memory. Indeed, given the number of jobs he worked, it would be unlikely that he would remember the exact dates he worked for each employer more than 3 years ago. *Brown*, supra. The brief occasions when Hernandez did not work (the longest was 2 months) do not constitute evidence of interim earnings during those periods. In any event, Respondent produced no evidence to counter Hernandez' testimony and any doubts should be resolved against Respondent as wrongdoer. *Florida Tile Co.*, 310 NLRB 609, 610 (1993), enfd. 19 F.3d 36 (11th Cir. 1994); *Kansas Refined Helium*, supra at 1162. In short, Respondent utterly failed to meet its burden of proof that Hernandez' interim earnings in 1994 and 1995 were not as set forth in the latest appendix to the backpay specification.

I found Hernandez' testimony as to when and where he worked during the years 1994 and 1995 and where he looked for work during his periods of unemployment, to be almost entirely adduced through leading questions put to him by counsel for the General Counsel. She was using an early affidavit of Hernandez taken by Morales. Counsel for Respondent didn't really contest this testimony during his cross examination, nor object to the constant leading questions put to him by the General Counsel.

However, I conclude his memory was poor, and he should have been able to recall most of the places he worked, and the approximate times of employment, and when he looked for work. I base this conclusion on the large number of witnesses with all types of backgrounds I have heard in backpay cases in over 20 years as an administrative law judge. Hernandez' prior recollection during the years of 1994–1995 was poor. As set forth below, it is of great importance in connection with his testimony concerning Baute's alleged duties as a busboy in

1992. As set forth below, and in great detail, I do not find Hernandez a credible witness in this connection.

However, with respect to Hernandez' search for work during the year 1994 and 1995, which are the only years Respondent disputes, he did work many jobs. Moreover from the time he first started looking for work, immediately following his discharge on December 25, 1992, the evidence establishes that between jobs he made a thorough search for work. Thus, at all times between jobs during the backpay period at issue, Hernandez looked for work by going from restaurant to restaurant and letting agencies know he was out of work. This method seems to have been successful as agencies obtained jobs for him at L'Incontro, Moreno's 133 Restaurant, and 11 Tinelo. In addition, Hernandez used personal connections (a coworker from Pasta al Forno) to get his job at Federico's.

Further proof of Hernandez' diligence in seeking employment is that he was rarely without work. The longest time he was unemployed during the period at issue was the interval between June 1994, when he left Pasta al Forno, and September 1994, when he began working for L'Incontro. This is a time known to be slow in the restaurant business in New York. Further, Hernandez testified to a job search within this period and Respondent was unable to rebut such testimony. Hernandez' job record thereafter is exemplary. Within a month after his layoff from L'Incontro, Hernandez was working at Federico's. The month after his layoff from Federico's, Hernandez got a job at Moreno's. After his layoff from Moreno's in February 1995, Hernandez got a job at 133 Restaurant in April 1995. Although Respondent contends there is a willful loss of earnings during March 1995, there is no evidence of that and Hernandez' job search during that job period wasn't any different from that of any other period. That his search was unsuccessful is not evidence that work was available and Hernandez refused to take it. *Allegheny Graphics*, 320 NLRB 1141 (1996), enfd. sub nom. *Package Service Co., v. NLRB*, 113 F.3d 845 (8th Cir. 1997). After his layoff from 133 Restaurant, Hernandez got work 1 month later at 11 Tinelo. After 11 Tinelo let him go in November 1995, he secured work at Elaine's by January 1996. As with all other contested periods, Respondent produced no evidence of any willful loss of earnings in December. Although Hernandez' work for 11 Tinelo's was terminated, it was not due to misconduct on his part. Rather, the evidence shows that 11 Tinelo's management determined that Hernandez' experience and skill were not quite up to their standards. As such, his termination by 11 Tinelo was not a willful loss of earnings. *Allied Lettercraft Co.*, 280 NLRB 979, 983 (1986). Hernandez explained that he was unable to find work in December because, although this is a busy season in the restaurant business, restaurants prepare for this and hire ahead of time.

Finally, with regard to Respondent's allegation of willful loss of earnings, Hernandez' work history shows that the only time Hernandez left a job of his own accord was when he ceased work at Pasta al Forno because he had a disagreement with the new owners. Actually, it is not clear that Hernandez' departure was totally voluntary, as he stated that after their disagreement, he was asked to leave. The disagreement occurred because the new owners made waiters split tips, causing Hernandez' salary to diminish so that, even though he was asked to work additional hours, those hours were during lunch and would not have made up for the money he would have lost in tips. Hernandez testified that leaving was not a decision he took lightly. He and the owner spoke about the problem, then they had a disagreement, and finally he left. Hernandez thereafter found work at Elaine's and began earning more than at any other interim job.

Whether on a voluntary basis or not, I conclude Hernandez' departure from Pasta al Forno does not mitigate Respondent's liability for backpay. A voluntary quit does not troll backpay when prompted by an earnest search for better paying employment. It is the Respondent's burden to show willful loss of earnings by unjustified quitting. *Lundy Packing Co.*, 286 NLRB 141, 144 (1987), 856 F.2d 627 (4th Cir. 1988), and Respondent has not done this. If Hernandez quit, he did so because his salary was going to be lowered and he needed to seek better paying employment. Moreover, the Board looks at the discriminatee's entire record, *Lundy*, supra at 145 to assess willful loss of earnings. Hernandez' record shows a diligent job search throughout the backpay period without any hint that he would ever incur a willful loss. As regards the possible involuntary departure, discharge for alleged good cause will not constitute willful loss of earnings, absent an offense involving moral turpitude. *Lundy*, supra at 146. The record shows that Hernandez' leaving Pasta al Forno did not involve moral turpitude or, for that matter, good cause as Hernandez had every right to complain that the sharing of tips was unfair.

Based on the above facts and the above cited Board law, I find that at all times within the backpay period, Hernandez obtained jobs to mitigate backpay, and when he was unemployed made a diligent and good-faith search for work. The Board law set forth and discussed above in detail, conclusively supports this finding.

Now, I turn my attention to Baute. After this trial opened, but before testimony was taken, counsel for Respondent alerted counsel for the General Counsel that he had evidence that Baute had been guilty of subornation of perjury by offering any witness who would testify that he, Baute, was a busboy, Baute would pay to that witness the sum of $1000. I assume, given the startling nature of such contention, which as set forth below, was proven through Baute direct testimony, that the Region was aware of counsel for Respondent's contention and Baute's testimony.

Baute became employed as a dishwater in March 1992. He was discharged on or about June 1992. Baute contends he worked as a busboy for 6 weeks, in addition to his duties as an expediter. An expediter does not deal with customers. He merely shouts out the orders given to him by the waiters to the kitchen so that they can prepare the order. A busboy has to know how to carry a tray, cut the bread, the butter, put it on the table, keep water glasses filled, and remove the service from the table, it has to be efficient but unobtrusive. Respondent's restaurant is a class restaurant, not some quick service in and out establishment. Respondent employs over 50 employees in the classifications of dishwashers, expediters, busboys, waiters, and chefs.

Baute testified that he worked 6 days a week as an expediter six dinner shifts per week and one lunch shift. He was paid $50

a dinner shift and $25 a lunch. He was paid, as all other employees, in cash for such work.

Baute also testified he worked as a busboy for 6 weeks, 3 days a week, a dinner shift, and two lunch shifts. He testified that for such work he received $20 a shift, in cash, and $30 to $40 in tips. Respondent contends that Baute was a "trainee" as a busboy for 1 week, but only received his usual expediter pay. He was not kept on as a busboy because he didn't work out.

For reasons set forth in detail below, I do not credit Baute's testimony that he worked as a busboy.

Baute also testified that during the period he worked for Respondent he received seven dinners and three lunches per week.

Ray O'Campo, the maitre d' at the time of Baute's employ credibly testified that expediters, busboys, and waiters were entitled to only one meal per day even if they worked a double shift. At times you could grab a cup of coffee or a dessert, but that would be consumed on the run, and not considered a meal. I credit O'Campo's testimony for reasons set forth below. Baute estimates dinners were worth $10 and lunches $5.

Baute testified he first became aware that Respondent was denying he ever worked as a busboy in preparation for the instant trial when so informed by the General Counsel. He testified that he received a letter from Region 2 stating that he would need to bring in witnesses to support his contention that he worked as a busboy.

Baute testified that, in order to obtain such witness, he telephoned Ray O'Campo because he believed him to be a truthful witness. When questioned as to his conversation with O'Campo, Baute testified as follows:

> I told him what my situation was. And at the same time I asked him if he remembered that I worked as a busboy and he said yes, and I told him that his lawyers for the restaurant were denying that I worked as a busboy, and that if he could testify that I did work as a busboy. He didn't answer me directly. I also told him that *I would pay him for the cost and for the inconvenience* if he had to go sign affidavits or go to trial.
>
> He didn't give me an answer, he didn't answer but he started telling me about how preoccupied he was since no one had called him and they hadn't bothered with him after he had left that place. And that he had some issues with illnesses and problems with an illness. But he led me to believe that we could meet for lunch and talk, and discuss some more. And that's how we ended.
>
> I also told him I would pay him for the past and inconveniences if he had to sign affidavits or to trial.

A short time later Baute telephoned O'Campo again and testified he had the following conversation with him.

> I asked him if he had made a decision, he had not changed anything in his decision about what I had asked him; that the lawyers continue denying that I worked as a busboy and that I needed a person like him, who knew that I worked as a busboy. And that the testimony had validity. So that he could testify to that. If not, I would lose a lot of money, money that was entitled to me.
>
> And at that time it surprised me when he told me that I did not work as a busboy, when the first time I had asked him he said yes. And he told me that I had worked around a week or something like that as a trainer.

O'Campo credibly testified that Baute did not work as a busboy; he did work as a "trainee" for maybe a week, but did not receive busboy pay. He was paid as an expediter. O'Campo did not know why Baute was made a trainee, because he did not assign him to a training position, nor reassign him back to his position, as a expediter. Clara Chaumont, Respondent's manager made these assignments. It is not known why Baute was reassigned from "a trainee" to his regular position of expediter. Chaumont was not called as a witness by either Respondent or General Counsel.

O'Campo did recall two telephone conversation with Baute. In each case he credibly denied that he ever remembered that Baute was busboy, or told him that he was a busboy, I credit O'Campo for the reasons set forth below.

Baute, at another point in his testimony admitted that during one of his conversations with O'Campo, that he offered O'Campo $1000 to cover his testimony "expenses and inconveniences" during his trial. I find any references by Baute or Bordon, set forth below concerning "expenses," and or "inconveniences" to be offers of $1000 to testify.

Leañdro Espiñal, a current employee employed by Respondent, credibly testified that Baute telephoned him and asked him if he would be able to testify that he, Baute worked as a busboy. In this connection Baute testified:

> Q. Did you tell Mr. Espiñal if he could think of anybody else, he should tell them that you'd pay them $1,000 apiece?
>
> A. Yes. I mentioned something about paying him. To pay others, that I would pay others the expenses.
>
> Q. Was it the expenses or $1,000?
>
> A. I consider it all one thing. When I got a subpoena for this place, they sent me a check for $40. I didn't think $1,000 was a big deal for somebody to come and say the truth.

Baute admits' "expenses and inconvenience" and offering $1000 to testify that he was a busboy are the same thing as he said, "I consider it one thing."

Baute also had a conversation with Pedro Martinez, an employee still working with Respondent. They met somewhere. During this conversation he asked Martinez if he knew anybody who could testify he was a busboy. In this connection Baute testified:

> A. I also told him that if he remember anybody, to tell them that I needed a witness that would say that I had worked there as a busboy. That they would remember that I had worked there as a busboy. And I also said that I would be able to pay them for whatever the "expenses" they would need and for the "inconvenience" of testifying. And that was in general what the conversation was. We exchanged telephone numbers.

I find the $1000 payment was discussed between them, since Baute used the $1000 interchangeably with "expenses" and "inconvenience of testifying."

Two days after Baute's conversation with Martinez and pursuant to Baute's offer of $1000 to any employee that would testify that Baute was a busboy, Wilbur Bordon called Baute. I find Bordon called Baute because Martinez had passed Baute's offer around, undoubtedly indicating Baute would pay $1000 for favorable testimony. Martinez gave Bordon Baute's number. There was no other reason for Bordon to call Baute.

During their telephone conversation Bordon testified:

> Well, I called Alex Baute and I asked him what was the situation, what had to be done. He explained that I had to come to court, and that he needed someone who worked with him at Victor's. And I told him yes, that it would be all right, that there was no problem. And I also let him know that—I let him know that the days that I wasn't working, that he had to pay me.
>
> Q. What did he say?
>
> A. That it was all right.

It is clear the subject of $1000 payment for favorable testimony was discussed because when I asked Baute if he was going to pay the $1000 "expenses" agreed on to Bordon, he said "no." And when I asked why, he said because Bordon called him and offered to testify. Of course Baute testified to this after Bordon had already finished testifying favorably for Baute. Baute was offering $1000 to witnesses for favorable testimony, but paying nobody. Some guy this Baute. Imagine making a deal with him on a handshake. This, among so many other factors, seriously affects Baute's credibility. However, I would find Baute to be a scoundrel and a blatant liar based solely on his offer of $1000 to anybody who could testify that he was a busboy in 1992.

As set forth above, Baute testified that whether it was $40 to testify pursuant to a subpoena, or a cash offer of $1000, it was the same thing, no big deal.

However, I find the sum of money offered by Baute is a big deal. When does an offer of a sum of money to a witness cease to become a fair amount to compensate the witness for his expenses and the inconvenience of testifying, and become a payoff or bribe to testify favorably. A $1000 for a day for preparation and a few minutes of testimony would amount to $300,000 a year, based on a 300-day year.

In *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964), Justice Potter Stewart, in a case involving defining hard-core pornography, stated:

> "I shall not attempt to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it."

I also know a bribe to a witness for favorable testimony when I see it. One thousand dollars to testify screams out to my sensibilities as a BRIBE, PAYOFF, or whatever other synonym one cares to use.

I find it incredible that counsel for the General Counsel is unable to see the difference. Apparently, she shares the same morality as Baute. What's the difference between a government fee of $40, or a private offer of $1000, $2000, or whatever.

Supreme Court Justice David Souter stated it so well in the New York Times editorial page of the October 6, 1999 issue, commenting on election campaign cash contributions.

> "[M]ost people assume, and I do, certainly, that someone making an extraordinarily large contribution, gets something extraordinary in return."

Justice Souter has expressed my feelings exactly. Accordingly, I find, on the basis of Baute's offer of $1000 to any witness who would testify that he was a busboy, that Baute is a blatant liar, totally incredible, except when he make admissions against his interest. Baute is the stuff that runs through the bottom of sewers.

What really infuriates me is that General Counsel strongly argues Baute's credibility in her brief although most of Baute's damaging testimony went into the record during her direct case. I wonder what position she would have taken if she discovered that Respondent had offered one of its witnesses $1000 to testify that Baute was not a busboy.

General Counsel amplifies her position in her brief, page 5, when she states:

> "Thus, it is clear that if Baute worked as a busboy, then any inducement to get someone to testify that he was a busboy is not subornation or perjury as the testimony would not be untrue or false."

I'm not interested if this is technically subornation of perjury or any other crime. When Baute offers this extraordinary sum of money to individuals to testify that he was a busboy, a fact that is in issue, he expects anyone accepting, such extraordinary offer to give the desired testimony, whether the witness remembers Baute's duties, or even Baute himself. I resent General Counsel's attempt to make Baute a choirboy, given the evidence before her, rather than the liar and scum that Baute's own testimony conclusively establishes that he is.

In *Multimatic Products*, 263 NLRB 373 (1982), a case which involved back dated Union cards and General Counsels knowledge of this, the Board stated:

> Furthermore, the Board acts in the public interest to enforce public, not private, rights. *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940). Indeed, we cannot emphasize strongly enough that serious allegations have been made, not only that a party to an unfair labor practice proceeding may have grievously abused the processes of this Agency, but also that personnel of this Agency may have somehow, wittingly or unwittingly, played a role in that abuse. Thus, the public interest and the public trust in this Agency are at stake.

I am not unmindful of Baute's affidavit in the unfair labor practice trial where he asserts he was a busboy. It does not appear that Baute testified in that trial. Baute was a college educated engineer, and as discussed above an intelligent witness, although a blatant liar. Based on Baute's testimony in this case, and my conclusion as to his credibility, I conclude he beefed up his job in this affidavit, so that if he was found to have been discriminatorily discharged he would receive more backpay.

With respect to Hernandez' credibility as to his interim earnings, Respondent did not seriously dispute this except as to the years 1994 and 1995. In establishing where Hernandez worked during this period, when he started, stopped when he moved on to the next job etc., virtually all of this testimony was established through leading questions. I don't have any problems with the accuracy of such answers since they are not seriously in dispute, but I do find that his inability to recall what jobs he had during 1994 and 1995 reflects on his credibility as to be able to recall what Baute's duties and position was in 1992. Moreover, there were over 50 employees working in a busy restaurant. Under these conditions I do not believe Hernandez was able to remember Baute's duties or his job title. Further, Hernandez was found by Judge Biblowitz in the unfair labor practice case to have manufactured evidence and not to be a credible witness. (See *Victor's Café 52*, 321 NLRB 504, 516 (1996).)

Accordingly, I conclude Hernandez is not a credible witness. I believe that Hernandez probably testified that Baute was a busboy because sometime during this trial, in the courtroom or hallways of Region 2, Baute made his usual $1000 offer to Hernandez. If so, I'd like to see him try to collect from Baute.

General Counsel argues in her brief that Bordon was "… a highly credible witness" a witness who "had nothing to gain by his testimony." She must be joking. Bordon answered Baute's oral advertisement conveyed to him by Martinez, 2 days after Baute asked Martinez to pass out his, (Baute's) telephone number to anyone who would testify that Baute was a busboy. Bordon had no reason to testify for Baute except for the money. (Baute has already testified that Bordon, who lived up to his end of the bargain was not going to be paid, anything).

In any event as set forth above, I don't believe, given the time lapse, their lack of familiarity and the busy conditions of the restaurant, that Bordon had any idea who Baute was, or what he did at Respondent's facility.

I credit the testimony of both Espiñal and O'Campo. I was impressed with their demeanor. They testified in detail as to why they were able to recall that Baute was not a busboy. For example Espiñal testified:

> Q. Mr. Espiñal, when Alex Baute worked at Victor's, do you remember whether he ever trained to be a busboy?
>
> A. Yes.
>
> Q. How do you remember that, if it was seven years ago.
>
> A. Because I have been—I'm an old timer there.
>
> Q. What do you remember about Alex Baute training as a busboy?
>
> A. Just that at the beginning, first he was a singer in the kitchen—first there was another one that was not him. So, one guy did not show up for work. So then he was practicing as a busboy. He likes the kitchen a little bit, and they just placed him as a singer.
>
> Q. Mr. Espiñal, do you remember how long Alex Baute trained as a busboy?
>
> A. About five days or a week.
>
> Q. How do you remember that?
>
> A. Because at that same time, there was a singer missing, then they placed him to be a singer.
>
> Q. Do you remember the name of the singer that was missing?
>
> A. I think it was Johnny.

As you can see, Espiñal did not require leading questions to describe Baute's duties.

Moreover, unlike Bordon, who was promised $1000 to testify that Baute was busboy, Espiñal received only cab fare and pay for his time away from work in order to testify.

With respect to O'Campo, he also testified in detail as to his knowledge of Baute's duties while employed by Respondent. For example O'Campo testified:

> Q. Do you know Alex Baute?
>
> A. Yes.
>
> Q. Did he work at Victor's in 1992?
>
> A. I don't remember the year, but I know he worked there.
>
> Q. When he Baute worked there, were you the maitre'd?
>
> A. Yes.
>
> Q. Was he an expediter?
>
> A. Yes, the same, an expediter.
>
> Q. Did he ever work for Victor's to be a busboy?
>
> A. No.
>
> Q. Was he ever trained by Victor's to be a busboy?
>
> A. He was in training for a week, maybe a couple of days more than a week. But that's all.
>
> Q. After the training for a week or a couple of days more than a week, did he become a busboy?
>
> A. No.
>
> Q. What job did he hold after this training for a busboy?
>
> A. Expediter.
>
> Q. Do you recall whether he ever worked as a dishwasher for Victor's?
>
> A. Yes, he started as a dishwasher.
>
> Q. How long did he work as a dishwasher, if you recall?
>
> A. I don't remember.
>
> Q. When he stopped being a dishwasher, what job did he hold after that?
>
> A. He went to the training, the one I just told you. He stopped there. And then an expediter.

O'Campo's testimony as to Baute's duties did not require leading questions. Moreover when asked how long Baute worked as a dishwasher, he candidly replied "I don't remember."

When the General Counsel tried to impeach his credibility during her cross-examination by establishing he really had no recollection as to who was working for Respondent during the time of Baute's employ, he testified as follows:

> Q. You said you were familiar with all of the people who worked in 1992.
>
> A. What year?
>
> Q. 1992.

A. Yes.
Q. Who worked there?
A. All the employees.
Q. All the employees you can remember. Who worked as a waiter?
A. Marselino, Manuelo, Humberto, Pedro, Rojello.
Q. Who did you remember who worked as a busboy?
A. Willie, Juan, Felix, Usto, David. That's it.

None of this testimony was rebutted by any witness or document. General Counsel's cross examination only served to enhance O'Campo's credibility.

Moreover, although O'Campo was friendly with Respondent's owners, the only payment he received for testifying was cab fare. He did not receive anything for the inconvenience of testifying or any other monies, because he had been retired for some time.

With respect to Baute's gross backpay, Respondent contends that it should be $300/week based upon Baute's working as an expediter for 6 days a week at a rate of $50/night shift. Baute testified he also worked a lunch shift on Wednesday at a rate of $25/shift.

Since there were no records or documents to rebut Baute's testimony on this issue, I find his gross weekly rate was $325/week. A set forth above I have concluded he was never a busboy and therefore General Counsels' contentions concerning such additional monies do not reflect Baute's accurate gross weekly earnings.

In Baute's original specification, he informed Ester Morales, compliance officer that he had earned $5650 in the third and fourth quarters of 1993, and $1920 in the first quarter of 1994 ad $1440 in the second quarter.

In the amended specification, it appears Baute told Morales that he had no interim earnings during these four quarters. In this regard Morales testified that Baute informed her that he in fact had no interim earnings during the above four quarters covering 1993 and 1994. And this is the reason the specification was amended. There is nothing in the record why he initially told Morales he had received such interim earnings. Given my credibility findings concerning Baute, I find he would not have listed such interim earnings with Morales in the original specification unless they were true. I find this is an admission against his interest, which he never denied. It was only when Morales, in preparation for trial was asked for his W-2 forms for this period that he denied any interim earnings. Given my findings as to Baute's credibility, I find it reasonable to infer that Baute was unable to produce the W-2's because he probably had the same "off the book" payments concerning these interim earnings, that he had with Respondent. Therefore, I conclude the disclosed interim earnings in the original specification are accurate and shall be deducted from his eventual gross backpay.

Respondent contends that Baute should be denied any backpay for the first, second, third, and fourth quarters of 1997 and first and second quarters of 1998 because he willfully concealed self employment interim earnings for those quarters, or at a minimum, earnings for each of those quarters in 1997 should be increased by $2,512.50, and interim earnings for each of the first two quarters of 1998 should be increased by $2,100.75.

The law regarding when a discriminate is to be denied backpay is clear. In *American Navigation Co.*, 268 NLRB 426 (1983), the Board held that "discriminatees found to have willfully concealed from the Board their interim employment will be denied backpay for all quarters in which they engaged in the employment so concealed." *American Navigation*, supra at 427. This remedy is applied only "where the claimant is found to have willfully deceived the Board, and not where the claimant, through inadvertence, fails to report earnings," Id. at 428. An employer cannot equate an error with the willful withholding of information. It is not mistakes but, rather, deliberate and perfidious misrepresentation which will result in cutting off backpay. *Allied Lettercraft Co.*, 280 NLRB 979 (1986). Thus, a claimant is not deprived of backpay merely because he failed to report all interim earnings to the Board during the compliance investigation. *Brown Co.*, 305 NLRB 62, 67 (1991).

Baute testified that, starting in the summer of 1996, while he was working for La Maganette, he began his own business doing translations from Russian into Spanish. Baute could not have known that his work on the side needed to be reported to the Board and there is no evidence in my view that Baute tried to conceal these earnings. He testified that the Region first asked for his W-2 forms. This conforms with the testimony of Morales that she did not know of Baute's earnings from self employment when she prepared the initial specification and prepared the most recent specification from W-2s rather than tax returns. That Morales did this simply shows General Counsel's willingness to admit without proof objectively verifiable facts which go to diminish the maximum amount of wage loss in order to expedite the hearing process and does not relieve Respondent of its burdens of proof. *Brown*, supra at 67 citing *Heinrich Motors*, 166 NLRB 783 (1967), enfd. 403 F.2d 145 (2d Cir. 1968). When the Region later asked Baute for his full income tax forms, he submitted them. I sustained General Counsel's objection and ruled that it was irrelevant when Baute informed the Region of these interim earnings, as the Board finds that revelation of information prior to commencement of trial is not an indication of willful concealment, even if the information is provided shortly before the event. Such information merely reflects new evidence adduced and cannot be used to carry Respondent's burden of establishing mitigation. *Rainbow Coaches*, 280 NLRB 166, 169, 186 (1986). The logic of this rule is demonstrated as it is obvious that someone attempting to conceal earnings would have pretended that he had not kept or could not find his tax returns.

Morales testified that even if she had known earlier about the earnings from Baute's translation business, it would not have affected her calculation of interim earnings. Morales is absolutely correct in her understanding of the law. As *Miami Coca Cola Bottling Co.*, 151 NLRB 1701, 1710 (1965), enfd. in relevant part 360 F.2d 569 (5th Cir. 1966), makes clear, when, while fully employed, a discriminatee take a part-time job during hours which do not conflict with full-time employment, earnings from the part-time job are considered supplemental and need not be deducted from gross backpay.

It is evident that Baute's translation work did not conflict with his full-time employment. Baute testified that he did his translations in the early mornings or on his days off. At no time did he turn down work from La Maganette where he worked an average of $5 shifts and four lunch shifts.

Respondent failed to produce any evidence of willful concealment by Baute of any interim earnings, including earnings from his translation business which should not, in any case, be included as interim earnings. Thus, this defense of Respondent's must be dismissed.

Although the period between Baute's discharge by Respondent on July 15, 1992 and his employment by Zelenda on August 10, 1992, is not contested, it is noteworthy that, although a discriminatee need not immediately look for a new job, *Saginaw Aggregates*, 198 NLRB 598 (1972); *Rainbow Coaches*, supra, Baute sought work right away by looking at ads, going to the Union and going to a restaurant where he felt his Russian would be useful. Within a month after his discharge, he was working. Baute's eagerness to work is also shown by the fact that he did not wait for restaurant jobs. He took jobs as a warehouse picker, security guard, salesman, and stock person until he was finally able to secure his current job as a waiter. Further evidence that Baute was anxious to work is shown by the fact that, during the period DAC was only able to offer him part-time work, he obtained a second job at Lite-Elite.

As for the period in question, Baute testified that he left his job working for Zelenda in the middle of 1993 because the company was moving to South Carolina and he did not want to move there. There is no question that a discriminatee need not accept employment unreasonably distant from home, *Delta* 293 NLRB 736, 738 (1989), citing *NLRB v. Madison Courier*, 505 F.2d 391, 395 (D.C. Cir. 1974), and Baute had every right to decide not to move to South Carolina. His next job began on August 5, 1994, when he had started working for Bell Security. He found out about this job through a friend who had started working there the week before and through an ad in the New York Times. During the period between the two jobs. i.e., the period that Respondent is contesting, Baute was in Russia from September 1993 to sometime in November 1993. He stayed in the United States, for 2 weeks and returned to Russia where he remained through the second week of January 1994. In addition, Baute was out of the country for 1 week in May 1994.

During all times Baute was out of the country, he was not credited with gross backpay. During all periods that Baute was in the United States, he sought work. Between the time he left Zelenda in mid-1993 and the time he left for Russia in September 1993, Baute searched for work by looking through the Sunday *New York Times* and by using a computer at the Social Security Office where the Unemployment Office is also bcated. Between the time Baute returned from Russia in mid-January 1994 and the time he began working for Bell at the beginning of August 1994, Baute looked for work by checking the Sunday, Tuesday, and Thursday *New York Times*, the computer in the Social Security Office, and the Russian newspapers. That Baute's job search was unsuccessful cannot be used as evidence showing that employment was available and he willfully refused to accept it. *Allegheny Graphics*, supra.

Respondent appears to contend that, during the period at issue, Baute was out of the country more times than he alleges and, therefore, unavailable for work. Respondent, however, produced no evidence to support such speculation. That Morales did not check the times Baute alleged he was out of the country against his passports proves nothing and, in any case, there was no way she could have done this as Baute only had a current passport. He explained, without contradiction that, as a refugee, he must renew his passport each year, and each time he renews, he must send his old passport to the Immigration Service.

Morales testified that she originally calculated the times Baute was out of the country based on information he gave her. Baute testified that the footnotes in the second revised appendix which set forth times he was unavailable for work reflect information he furnished the Region anywhere from 4 months to a year prior to hearing. He based these dates on his recollections as he had no written records, such as old passports, to substantiate the periods he was unavailable to work.

As noted previously, that Baute was mistaken in his initial conversations with Morales when he outlined time out of the country is not crucial as the Board recognizes that individual claimants have difficulty in keeping accurate accounts. See *Rainbow Coaches*, 280 NLRB 166 at 186, and is aware that early statements prepared by persons unaccustomed to preparing such documents, and with little regard for their ultimate importance are not as reliable as their testimony under oath. *Continental Insurance Co.*, 289 NLRB 579, 591 (1988). Baute's continuing efforts to recollect additional information as to when he was out of the country is to his credit and should be used against him.

The modifications of the backpay specification do not help Respondent meet his burden of establishing mitigation. *Rainbow Coaches* at 169. Respondent has adduced no evidence to counter Baute's' consistent and credible testimony that he was not unavailable for work nor did he fail to seek employment the third quarter of 1993 through the second quarter of 1994, as alleged.

On the above findings of fact, and conclusions of law, I make the following recommended[1]

ORDER

Respondent, Victor's Café 52, Inc., its officers, successors, and assigns, shall make the employees named below by paying to them the amounts set forth opposite their names, plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), accrued to the date of payment minus tax withholding required by Federal and State laws.

Raimundo A. Baute	$31,081.21
Humberto Hernandez	$17,990.20
Total Backpay	$49,071.41

Dated, Washington, D.C. November 15, 1999

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.